

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

<b>Peggy Friedel</b> , Individually and as the	)	CIVIL ACTION NUMBER
Administratrix of the <b>Estate of Mandy K.</b>	)	
<b>Friedel</b> and as Next Friend of <b>Makayla</b>	)	06C-11-233-JOH
<b>Friedel</b> and <b>David T. Wheat</b> , minors,	)	
and <b>David Friedel</b> , Individually	)	
	)	
Plaintiffs	)	
v.	)	
	)	
<b>Abimbola O. Osunkoya, M.D.</b> ,	)	
Individually and as Agent for <b>Delaware</b>	)	
<b>Primary Care, LLC</b>	)	
	)	
Defendants	)	

*Submitted: May 13, 2010*  
*Decided: June 25, 2010*

**MEMORANDUM OPINION**

*Upon Motion of the Defendants for Reargument on Plaintiffs' Motion to  
Limit the Testimony of Dr. Bruce Goldberger - **DENIED***

***Appearances:***

Martin J. Siegel, Esquire, of the Law Offices of Martin J. Siegel, Wilmington, Delaware,  
Attorney for the Plaintiffs

Colleen D. Shields, Esquire, of Elzufon Austin Reardon Tarlov & Mondell, P.A.,  
Wilmington, Delaware, Attorney for the Defendants

HERLIHY, Judge

Dr. Ambiola Osunkoya moves to reargue this Court's prior decision holding he could not use his toxicology expert, Dr. Bruce Goldberger, to opine about cause of death.<sup>1</sup>

In that decision this Court said:

The Court is satisfied, however, that Dr. Goldberger cannot testify about the typical dosage of methadone for pain management nor can he testify about methadone ingestion was not a proximate cause of Friedel's death.<sup>2</sup>

In Dr. Osunkoya's response to the plaintiffs' earlier motion to exclude Dr. Goldberger, upon which the Court relied in reaching its conclusion, he stated:

Dr. Goldberger is expected to testify that the dose of Methadone prescribed by Dr. Osunkoya is typical for the treatment of pain.

Dr. Goldberger is expected to testify that the methadone concentrations reported by the Office of the Chief Medical in femoral blood (110ng/mL) and by NMS Labs in Cardiac blood (60ng/mL) are unremarkable, and thus, methadone ingestion is not the proximate cause of death. Dr. Goldberger will also testify that, although the medical examiner's autopsy report contributes the ingestion of Toprol, Risperdal, Wellbutrin, and Depakote to Ms. Friedel's death, the Office of the Chief Medical and NMS Labs do not report results for these drugs.<sup>3</sup>

In his motion for reargument, Dr. Osunkoya now refines his proffered use of Dr. Goldberger's testimony:

Dr. Goldberger's opinions are distinguishable from medical pathology opinions establishing cause of death. They are of the variety of opinion that pathologist or medical examiner routinely relies on a toxicologist to provide

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<sup>1</sup> *Friedel v. Osunkoya*, - - - A.2d - - -, 2010 WL 1959588 (Del. Super.).

<sup>2</sup> *Id.* at \*4.

<sup>3</sup> *Id.* at \*3.

to assist him or her in the effort to establish cause of death.

\* \* \* \* \*

Dr. Strayer (defendants' pathologist) will testify that because of critical deficiencies in Ms. Friedel's autopsy, in his expert opinion, her cause of death cannot be determined to a reasonable degree of medical probability. When he explains this opinion to the jury, he will describe how the toxicology opinion of Dr. Goldberger, relating to the amount of methadone that was found in Ms. Friedel's blood postmortem, factors into his analysis.

\* \* \* \* \*

In this case, Dr. Goldberger has offered the toxicology opinion that it is scientifically improbable that methadone toxicity resulted in fatality at the levels reported in Ms. Friedel's postmortem blood sample. However, because there are multiple deficiencies with the autopsy, Dr. Strayer does not have sufficient evidence available to determine whether there is an alternative explanation for Ms. Friedel's death, and, therefore, although it is scientifically improbable based on Dr. Goldberger's opinion, he is unable to give an opinion based on reasonable medical probability as a role, if any, that methadone toxicity was a contributing factor to the death.<sup>4</sup>

Dr. Osunkoya's motion to reargue was e-filed May 13, 2010. Under the rules of this Court, the plaintiffs were to respond within five days. The plaintiffs had not had the courtesy of responding at all.

In his current motion, Dr. Osunkoya discusses the often close relationship of a toxicologist to a pathologist. The Court as an attorney and a judge has participated in a number of trials where someone died and is abundantly familiar with that relationship. That time span covers over forty years.

The fact remains, however, that while Dr. Goldberger's toxicological credentials are impressive, he still is not a pathologist. As this Court said before, that means he is not

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<sup>4</sup> Defendants' Mot. to Reargue at ¶¶ 5, 8, and 11.

qualified under Delaware law to opine about cause of death.

Dr. Osunkoya is caught in a conundrum. His pathology expert will opine that the autopsy in this wrongful death case was so inadequate that a cause of death cannot be established with reasonable medical probability. In its earlier decision relating to plaintiffs' motion to preclude his testimony, the Court held the pathologist could testify about how it is impossible to opine that methadone caused the death because of the autopsy's incompleteness.<sup>5</sup>

And yet now Dr. Osunkoya wants Dr. Goldberger to opine "that it is scientifically improbable that methadone toxicity resulted in fatality at the blood levels in the decedent's postmortem blood sample."<sup>6</sup>

This Court's difficulty with that refined proffer is that (1) it is cumulative of the defense's pathologist's testimony and (2) borders sufficiently close to causation (or lack thereof) testimony which the Court has already ruled inadmissible.

To a lay jury, such testimony comes out as methadone did not cause the decedent's death. That is expert testimony from someone lacking the requisite competence - not being a pathologist - to present to a jury.

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<sup>5</sup> *Friedel*, 2010 WL 1959588, at \* 2-3.

<sup>6</sup> Defendants' Mot. to Reargue at ¶ 11.

*Conclusion*

For the reasons stated herein, the defendants' Motion to Reargue is **DENIED**.

**IT IS SO ORDERED.**

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J.